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No. 93-7407

IN THE

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,
Petitioner,

vs.

FRED McANINCH, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL AND OHIO ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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20PP

QUESTION PRESENTED

DOES THE STATE BEAR THE BURDEN OF PROVING CONSTITUTIONAL ERROR HARMLESS UNDER *BRECHT V. ABRAHAMSON*, 113 S. CT. 1710 (1993)?

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BRIEF OF *AMICI CURIAE* THE NATIONAL AND OHIO ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

This brief in support of the Petitioner is submitted with the written consent of counsel to the parties, copies of which are filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 7,000 lawyers and 20,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or

judges in state and federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a state-wide organization of more than four hundred fifty (450) attorneys practicing primarily in the field of criminal defense law. The organization is affiliated with the NACDL and it has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law. The membership of the OACDL includes both private practitioners and public defenders many of whom have served as prosecutors.

Both the NACDL and the OACDL believe that the precious constitutional rights of the people must be jealously guarded against encroachment by the government, for a right once lost is never to be regained. The Great Writ of Habeas Corpus is the primary means of redressing constitutional violations. It is the means through which James Madison's vision of an independent federal judiciary to protect the Bill of Rights is to be achieved. But the devil is in the details. Proving the wrong is no longer enough. The question of who must prove the harm or lack thereof could effectively destroy habeas corpus as a means to redress constitutional violations, and a right without a remedy is no right at all. This brief is filed because the Associations believe that federal habeas corpus must remain a viable and effective tool to remedy the constitutional wrongs ignored by state courts.

ARGUMENT

THE STATE BEARS THE BURDEN OF PROVING CONSTITUTIONAL ERROR HARMLESS UNDER *BRECHT V. ABRAHAMSON,* 113 S. CT. 1710 (1993).

I

Harmless error analysis occurs only after the habeas petitioner has borne the initial burden of establishing a constitutional violation. *Lockhart v. Fretwell,* _____ U.S. _____, 113 S. Ct. 838, _____, 122 L. Ed. 2d 180, 189 n.2 (1993). Once constitutional error is proven, the question arises whether the error justifies a retrial. *Brecht v. Abrahamson,* _____ U.S. _____, 113 S. Ct. 1710 (1993) provides part of the answer. Retrial should occur when the constitutional violation substantially affected the outcome of the trial. The question remaining, here presented, is who bears the burden on the "substantial impact" issue. On the basis of equitable concerns, the obvious answer to this question is that the proven wrongdoer should bear the burden.

Habeas corpus is an equitable remedy. *See, Fay v. Noia,* 372 U.S. 391, 438 (1963) (citing *United States ex rel. Smith v. Baldi,* 344 U.S. 567, 573 (Frankfurter, J., *dissenting*)). 28 U.S.C. §2243 mandates that the federal habeas court, ". . . *shall* . . . dispose of the [habeas corpus application] as law *and justice* require." (emphasis added). *See also, Kuhlman v. Wilson,* 477 U.S. 436 444-45 (1986); *Stone v. Powell,* 428 U.S. 465, 492 n.31 (1976); *Sanders v. United States,* 373 U.S. 1, 17 (1969). This Court has noted that, "[h]abeas jurisdiction is tempered by the restraints that accompany the exercise of equitable discretion." *Withrow v. Williams,* _____ U.S.

_____, 113 S. Ct. 1745, 1766 (1992). This important principle has been a consistent and recurring theme in this Court's habeas jurisprudence. *See, e.g., Herrera v. Collins,* _____ U.S. _____, 113 S. Ct. 853, 862 (1993); *McCleskey v. Zant,* _____ U.S. _____, 111 S. Ct. 1454, 1465-68, 1474-75 (1991); *Dugger v. Adams,* 489 U.S. 401, 410 (1989); *Moore v. Zant,* 885 F.2d 1497, 1504 (11th Cir. 1989) (*en banc*), *cert. denied,* 497 U.S. 1010 (1990).

There may be no better example than the case at bar why, for equitable reasons, the state should retain the burden. As he has done so often in the past (*see* note 1, *infra*), the prosecutor in this case appealed to passion and prejudice to arouse emotion and thereby gain a conviction. It is sometimes said that error has "crept" into the trial of a case. Not so the case at bar. It marched into this case like an army with banners and trumpets and with Mr. Marino leading the way. As the Magistrate noted, it was impossible that "O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing [. . .]; the prosecutor's inflammatory argument designed to stir the passions of the jurors [. . .]." Supplemental Report and Recommendation at 7-8 (J.A. 209-10). In this case the prosecutor suggested that the jurors wrap themselves in a blanket and "see what the victim of a murder is like." As the Magistrate correctly observed:

> Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the bloodstained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan,* 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson,* 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

Magistrate's Report and Recommendation, at 40 (J.A. 150-51).

Justice Frankfurter observed that, "A criminal trial should have the atmosphere of an operating room." *Sacher v. United States,* 343 U.S. 1, 37-38 (1952) (Frankfurter, J., *dissenting*). In this case, however, a more appropriate analogy would be to the atmosphere surrounding the *Geraldo*! show:

> The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt.

Magistrate's Report and Recommendation at 48-49 (J.A. 161).

It is a strange thing to suggest that the state has an interest in protecting a conviction achieved as this conviction was through violations of those federal constitutional rights designed to insure a fair trial and a

reliable result. The state has no such interest. Some individuals serving as attorneys for the state might have such an interest, but society demands fair trials which achieve just and reliable results.

II

Relevant policy considerations in addition to the equities support an allocation of the burden of proving harmlessness to the wrongdoer. Serious constitutional error affects the reliability of the fact finding process. Such error lessens reliability in ways that may not be immediately apparent upon review of a cold record by an appellate or quasi-appellate court. Often serious constitutional violations result in evidence not appearing in the record thereby falsely enhancing the appearance of strength of the state's case. The absence of one or two facts can dramatically alter the appearance of guilt. It is a great mistake to decide the result of a case on review based upon a belief in the probable guilt of the accused when serious constitutional error is present. It may be that very constitutional error that gives rise to the appearance of probable guilt. This is, of course, a natural and understandable tendency in appellate judges but, nevertheless, one which must be guarded against with vigilance and vigor. The greatest of these safeguards is the allocation of the burden of proof of harmlessness in the presence of serious constitutional error. *Kotteakos v. United States*, 328 U.S. 750 (1946), reduced the standard of error in such cases, although the degree to which the standard has been lessened is unclear. It would be a far more serious mistake to change the traditional allocation of the burden of proof of harmlessness, and it would be a mistake which would advance no legitimate interest. Comity does not require this nor is it required by any principle of federalism. The ordinary citizen walking

down the street would not understand this to be a fair thing. A rule which would allow the party causing the constitutional error to benefit from it by placing the burden of proving harmlessness upon the injured party is simply unfair.

It would also encourage the commission of constitutional error. Attorneys want to win cases. Of course, the job of a prosecuting attorney is far different from that of defense counsel. As noted in *Berger v. United States*, 295 U.S. 78, 88 (1935), "the duty of the prosecutor is to seek justice, not merely to convict." Unfortunately these noble words are sometimes honored in the breach. Some prosecutors fail to develop a sense of justice that recognizes anything other than a conviction as a service to society.[1] It is an easy thing to view a criminal trial as a sporting contest where, as in the words of Justice Fortas, the defendant is a piece in a game of chess. *Giles v. Maryland*, 386 U.S. 66, 100 (1967), (Fortas J., *concurring*). *See also* Brennan, *The*

[1] The prosecutor in this case is just such a prosecutor. He has committed misconduct amounting to constitutional error warranting reversal in at least three prior cases. *See State v. Liberatore*, 69 Ohio St. 2d 583, 433 N.E.2d 561 (1982) ("... the prosecution presented a textbook example of what a closing argument should not be. [...] This thoroughly unprofessional conduct prejudiced the defendant's rights to such an extent as to require reversal."); *State v. Keenan*, 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993) ("To declare as nonprejudicial the conduct of the assistant prosecutor in this case would be to announce a new standard for the prosecution of death penalty cases—a standard that falls dramatically short of that which is guaranteed to any person accused of a capital crime by both the Ohio and United States Constitution."); *State v. Hedrick* (Dec. 20, 1990) Cuy. App. No. 57844, *unreported*, 1990 WL 209885 (improper closing argument, comment on the defendant's failure to testify, comment on matters outside the record, improper bolstering of prosecution witness credibility held not "harmless beyond a reasonable doubt"). *State v. Hedrick* is on file with the Clerk.

Criminal Prosecution: Sporting Event Or Quest For Truth? 1963 Wash. U.L.Q. 279, 292. Where serious constitutional error is present it is likely that the prosecutor has failed to live up to the *Berger* standard. When this happens it falls upon the federal courts to enforce the Bill of Rights against the states and in favor of the citizen accused. This is the traditional role of the federal habeas courts. It is the role that James Madison assumed that the federal courts would play in our federalist system of government. But it is a role which will be forfeit if the burden of proof of harm is allocated to the party that suffered the harm.

III

Brecht v. Abrahamson, _____ U.S. _____, 113 S. Ct. 1710 (1993) changed the substantive standard for assessing the harmlessness of constitutional error in habeas corpus proceedings. *Brecht* did not, however, change the allocation to the state of the burden of proving harmlessness. There are five reasons why the majority opinion in *Brecht* cannot be read to assign the burden of proof to the habeas petitioner.

In the first place, the majority opinion does not contain a single word or any passage devoted expressly to the allocation of the burden of proof. Second, other parts of the majority opinion stand for the proposition that issues not "squarely addressed" by this Court should not be taken as decided. *Brecht, supra*, 113 S. Ct. at 1718 (majority opinion). Third, the majority opinion clearly acknowledged the difference between the "*Chapman* [*v. California*, 386 U.S. 18 (1967)] standard for determining whether a conviction must be set aside because of federal constitutional error [. . .]" and *Chapman's* allocation of the "burden of proving that an

error passes muster under this standard," which, as the court noted, "[t]he state bears." *Brecht, supra*, 113 S. Ct. at 1717. At every critical juncture the distinction is made between the standard which is changed and the allocation of the burden which is not. *Id.* at 1714, 1718, 1721-22. Fourth, Justice Stevens explicitly stated that he would not have joined the majority opinion, except for his understanding that the opinion placed the burden of proof upon the state. *Brecht, supra*, 113 S. Ct. at 1713 (Stevens, J., *concurring*). Fifth, five justices—Justice Stevens in a concurring opinion and Justices White, Blackmun, O'Connor, and Souter in dissenting opinions—explicitly endorsed harmless error rules allocating the burden of proving harmlessness to the state. *See Brecht, supra*, 113 S. Ct. at 1723-24 (Stevens, J., *concurring*); *Id.* at 1727 (White, J., *dissenting*, joined by Blackmun and Souter, J.J.); *Id.* at 1729 (O'Connor, J., *dissenting*).

What this Court did in *Brecht* regarding allocation of the burden should not be changed in the case at bar. There is no good legal reason for imposing upon the petitioner the burden of proving harmful constitutional error committed by the state. Indeed, there are compelling reasons to the contrary.

Justice Blackmun has aptly encapsulated the law governing the allocation of the burden of harmlessness under *Kotteakos* and the other authoritative sources to which *Brecht* refers:

> Every harmless error standard that this Court has employed . . . shares two salient features . . . [the first being that,] once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted.

Darden v. Wainwright, 477 U.S. 168, 197 (1986) (Blackmun, J., *dissenting*).

Chief among the Court's cases that have allocated the burden of proving harmlessness to the wrongdoer is *Kotteakos v. United States*, 328 U.S. 750 (1946), the very decision from which *Brecht* adopted the harmless error standard that now is to apply in habeas corpus proceedings. As to all constitutional error and much nonconstitutional error—*i.e.*, as to all errors save those that are merely "technical"—*Kotteakos* expressly concluded that "the burden of sustaining a verdict will . . . rest upon the one who claims under (the tainted verdict)." *Id.* at 760-61. *See Brecht v. Abrahamson*, 113 S. Ct. at 1723 (Stevens, J., concurring) ("[In deciding] what the collateral attack standard should be for . . . [trial] error . . . the Court endors[es] Justice Rutledge's thoughtful opinion for the Court in *Kotteakos* . . . . Because that standard . . . places the burden on prosecutors to explain why those errors were harmless . . ., I am convinced that our [holding] is correct.").

It seems a simple matter of fairness and common sense to allocate the burden of proving error harmless to the one who caused the error in the first place. If the state as a litigant benefits through deprivation of a constitutional right of a defendant, then society demands that the state as a litigant bear the burden of proving the error harmless. Society as a whole has as much concern about the fairness of the criminal justice system as it does with the result thereof. Our government rules at the sufferance of the people. Therefore, its interest in governing fairly and impartially is as compelling as its interest in governing at all. *See Berger v. United States*, 295 U.S. 78, 87 (1935). The very suggestion that the prosecutor, as representative of such a sovereign, could first violate the constitutional rights of the citizen accused, benefit therefrom by gaining a conviction and

then demand that the burden of proving prejudice be allocated to the party who has been harmed flies in the face of fundamental fairness.

Besides *Kotteakos* there are only five potential sources of an allocation of the burden of proof that *Brecht* could be viewed as endorsing. The first is this Court's decision in the *United States v. Lane*, 474 U.S. 438 (1986), the second is the harmless error provision in Rule 52(a), Federal Rules of Criminal Procedure, the third is the Federal Harmless Error Statute, 28 U.S.C. §2111, the fourth is *Chapman v. California* and the fifth is an analogy to the other defenses to habeas corpus relief that the Court has recognized. All five of these authorities either cycle the analysis directly back to *Kotteakos* or independently allocate the burden to the state.

The discussion of *United States v. Lane* in *Brecht* was in reference to the *Kotteakos* standard of review. 474 U.S. at 449. *Lane* does not discuss the allocation of the burden of proof but only the standard of proof. The standard which *Lane* discusses is the *Kotteakos* standard:

> The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence" in determining the jury's verdict.

474 U.S. at 449 (quoting 328 U.S. at 776).

Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to relief based on trial error unless the error resulted in "actual prejudice." *See United States v. Lane*, 474 U.S. at 449. It is clear from the page in *Lane* that *Brecht* cites and it is clear from *Brecht* itself that "actual prejudice" refers to the standard of review and not the allocation of the burden:

> The *Kotteakos standard* is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht v. Abrahamson, supra, 113 S. Ct. at 1721-22 (emphasis added).

Brecht cites *Lane* in order to explain the *Kotteakos* standard. *Lane* is not cited to elucidate the allocation of the burden of persuasion once substantial error is shown to exist.

Rule 52(a), Federal Rules of Criminal Procedure has been traditionally and authoritatively interpreted as placing the burden of proving harmlessness upon the government. *See* 3A C. Wright, *Federal Practice & Procedure: Criminal 2D* §854, at 304 & n.17 (1982). *See also, United States v. Olano,* _____ U.S. _____, 113 S. Ct. 1770, 1777-78, 1781, 1782 (1993).

28 U.S.C. §2111 states in relevant part that, "on the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." This statute, as was true with Criminal Rule 52(a), states the standard of review in terms of a negative showing that the state, not the petitioner, would be expected to make. This Court has treated §2111 and Rule 52(a) similarly and construed both as requiring the government to show "the absence of prejudice." *United States v. Olano,* 113 S. Ct. at 1778, 1781. *See also, United States v. Lane,* 474 U.S. at 454-55 (Brennan, J., concurring in part and dissenting in part). Of course, *Kotteakos* itself construed the then existing harmless error statute, and it is clear beyond argument that *Kotteakos* allocated the burden to the government. Perhaps the simplest means of discerning who has the burden is by discerning who loses

in the event of a tie. According to both *Kotteakos* and *Lane* the government loses. *See Lane,* 474 U.S. at 449 (quoting *Kotteakos,* 328 U.S. at 765).

Chapman v. California reached the same conclusion in its discussion of the allocation of the burden of proof, which unlike its discussion of the standard of proof, had recourse to *Kotteakos* and the entire American Common Law tradition in regard to harmless error:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman v. California, supra, 386 U.S. at 24 (citing 1 Wigmore, *Evidence* §21 (3d ed. 1940)).

Finally, in applying the other habeas corpus defenses that this Court and Congress have devised in service of those same jurisprudential interests and policy considerations (*e.g.,* exhaustion of state remedies, nonretroactivity and procedural default) this Court and the lower federal courts have repeatedly recognized that interests of finality, comity, and federalism do not justify absolving the responding party of its traditional burden of pleading and proving the defenses upon which it relies. *See, e.g., Godinez v. Moran,* _____ U.S. _____, 113 S. Ct. 2680 (1993) (state waived *Teague* defense); *Granberry v. Greer,* 481 U.S. 129, 134 (1987) (state has a duty to advise the district court of nonexhaustion defense); *Estelle v. Smith,* 451 U.S. 454, 468 n.12 (1981) (failure to timely assert state procedural bar waives the defense); *Sanders v. United States,* 373 U.S. 1, 11 (1963) (government can waive abuse of writ defense).

CONCLUSION

When a habeas petitioner has shown that his or her trial has fallen below the constitutional standard, then that conviction should and must be set aside unless the state can make a compelling showing that the error was harmless and did not substantially affect the outcome of the trial. Any other allocation of the burden would be sheer folly.

Respectfully submitted,

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